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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK EVANS,

Defendant and Appellant.

C082405

(Super. Ct. No. 15F00638)

On February 1, 2015, defendant Frank Evans was involved in a heated family argument during a Super Bowl party. Defendant was convicted of making a criminal threat (Pen. Code, § 422; count two),¹ two counts of assault with a semiautomatic firearm (§ 245, subd. (b); counts three & four), being a felon in possession of a firearm (§ 29800, subd. (a)(1); count five), having two prior strikes (§§ 667, subd. (e)(2), 1170.12, subd.

¹ Undesignated statutory references are to the Penal Code.

(c)(2)), having two prior serious felony convictions (§ 667, subd. (a)), having a prior prison term (§ 667.5, subd. (b)), and personal use of a firearm as to counts two through four (§ 12022.5, subd. (a)).

On appeal, defendant contends the trial court erred in failing to provide a sua sponte instruction on the lesser included offense of assault with a firearm for counts three and four. He also contends his sentence for count five should have been stayed pursuant to section 654, and the People agree. The People also contend the matter must be remanded for resentencing because the trial court failed to properly impose the enhancements for defendant's two prior serious felony convictions and the single prior prison term.

We conclude defendant's sentence on count five must be stayed and remand is required for resentencing of the two prior serious felony enhancements and the single prior prison term enhancement; and, in a second case resentenced at the time of sentencing herein, the abstract of judgment must be corrected.

FACTUAL AND PROCEDURAL BACKGROUND

On February 1, 2015, Pamela Reed and her husband James Reed hosted a Super Bowl party at their home. Members of James's extended family attended, including defendant, who is James's brother. Defendant's girlfriend Sheradee also attended. James, defendant, and Sheradee each drank alcohol during the party, but Pamela did not. At some point, Sheradee spilled a drink on a coffee table and a photo album with pictures of Pamela's mother and mother-in-law, both deceased. Pamela became upset because she feared the photos would be damaged and Sheradee was not helping clean up the spill. Defendant and Sheradee briefly went outside to the backyard, then returned inside and left via the front door.

Although at trial Pamela testified she did not remember what happened next, she spoke about the incident with Detective Nathan Traxler on February 9, 2015. An audio recording of the interview was played for the jury at trial. Pamela told Detective Traxler

that James, defendant, and Sheradee exited the house together and stood near defendant's car, talking. Pamela went outside and tried talking to defendant, but he "blew up," and started yelling and calling Pamela names. Pamela responded by calling defendant names, which "made [defendant] more mad." Defendant approached Pamela, insulted Pamela's deceased mother, and bumped his chest into Pamela. Defendant began walking away and said, "I'll have my girlfriend come beat [you] right now." When defendant was 10 feet away from Pamela, he pulled a gun and pointed it at Pamela, tilted sideways. James, who at this point was standing near Pamela, said, "[You're] gonna have to shoot me first." Defendant walked back to the car but continued yelling at Pamela, saying he knew someone who would come and "mop the floor" with her. Defendant and James continued arguing, with defendant pulling out his gun three more times. Pamela returned to the house, and defendant eventually left in his car. James called the police, who arrived 20 minutes later. While they were waiting for the police, defendant repeatedly called and left messages for James, saying he knew someone who would come and "stomp" Pamela and beat her up. Defendant also threatened to return and have Sheradee come and beat up Pamela. James eventually changed his phone number. Pamela told Detective Traxler she thought defendant was "dangerous." Pamela testified at trial that her memory of events was better during her conversation with Detective Traxler than at trial. She also testified she did not lie to Detective Traxler and did her best to tell him what she remembered.

One of defendant's voice messages to James was played for the jury at trial. Defendant said he had "lost all respect" for James, who needed to put Pamela "in check." Defendant threatened to find Pamela and bring someone to "maul" her.

At trial, an audio recording of James's call to 911 made 10 minutes after the incident was played for the jury. James told the operator defendant pulled a "40 caliber" gun on him and Pamela, which James also described as a "9 millimeter Glock," a "9 millimeter," a "Glock," and, a "40 caliber." James said defendant pulled the gun out

three times, causing him to “fear for [his] life.” In addition, James warned defendant he would have to shoot James before Pamela. On February 23, 2015, police located defendant in a house and found a loaded Hi-Point .40-caliber semiautomatic handgun in his bedroom. Officer Mike Rodriguez testified at trial the gun looked similar to a Glock.

Deputy Isaac Johnson testified at trial that he responded to James’s 911 call. Deputy Johnson interviewed James, who said he and Pamela argued with defendant, and defendant pulled out a gun, pointed it at them, and threatened to kill them. James told Deputy Johnson that defendant showed him the gun during the party, and James described it as a “black semi-automatic pistol,” namely a “.40 caliber Glock.” James also said he stood in front of Pamela, but defendant threatened to kill him, too.

Deputy Daren Allbee testified at trial he interviewed Pamela the night of the incident. Pamela told Deputy Allbee defendant pointed a gun at her and called her names. She also said James stood in between her and defendant and said, “[I]f you have to shoot her, you have to shoot me also.” In addition, Pamela said she believed defendant’s threats and feared he would kill her.

A week after the incident, James spoke with Detective Traxler. An audio recording of their conversation was played for the jury. James told Detective Traxler he asked defendant to leave, but defendant stayed until Pamela came out of the house. At that point, defendant pulled a gun, threatened to shoot Pamela, and “chest bump[ed] her.” James said he stepped in front of the gun and said defendant would have to shoot him first. Defendant threatened to “light this whole . . . house up,” and left threatening voice messages on James’s phone. Defendant also called James a “snitch.”

At trial, James testified he did not want to testify and did not remember defendant pulling out a gun or threatening to shoot. He loved his brother and he did not want to see him get into trouble. James testified he was “very intoxicated” during the incident. He also testified he had “seen guns before,” and that was why he told the 911 operator he saw a .40-caliber handgun. He testified he “made it all up” and “lied about everything”

to the 911 operator and the police. Similarly, Pamela testified at trial that she loved her brother-in-law and did not want him to get into trouble.

Albert Reed, defendant and James's older brother, also testified at trial he was at the Super Bowl party. According to Albert, defendant got into a "heated" argument with James and Pamela, but neither pulled out a gun nor threatened to kill Pamela or James. After defendant and Sheradee left, James told Albert, "I'm going to send [defendant] to prison." Albert then overheard James on the phone with 911, saying defendant "pulled a firearm on him." During cross-examination, Albert testified he loved defendant and did not want to see him get into trouble.

On January 28, 2016, a jury found defendant guilty of counts two (§ 422), three (§ 245, subd. (b)), four (§ 245, subd. (b)), and five (§ 29800, subd. (a)(1)). The jury also found true the firearm use enhancement allegation with respect to counts two, three, and four. (§ 12022.5, subd. (a).) In separate proceedings, the trial court, on July 1, 2016, found true defendant had a prior prison term, (§ 667.5, subd. (b)), two prior strikes (§§ 667, subd. (e)(2), 1170.12, subd. (c)(2)), and two prior serious felony convictions (§ 667, subd. (a)).

On July 1, 2016, the trial court sentenced defendant to state prison as follows: on count four, 25 years to life, plus four years for the firearm enhancement and five years for the serious felony enhancements; on count three, 25 years to life concurrent, plus four years for the firearm enhancements and five years for the serious felony enhancements; on count two, 25 years to life, plus four years for the firearm enhancement, stayed pursuant to section 654; on count five, 16 months (eight months doubled due to the prior strikes) consecutive plus one year for the prison prior. The trial court also resentenced defendant in San Joaquin County case No. SF130846A, to a subordinate and consecutive term of 16 months in state prison for violating section 29800, subdivision (a)(1). The abstract of judgment incorrectly states the date of conviction.

DISCUSSION

I

Defendant contends the trial court erred in failing to instruct sua sponte on assault with a firearm (§ 245, subd. (a)(2)) as a lesser included offense of assault with a semiautomatic firearm (§ 245, subd. (b); counts three & four). According to defendant, assault with a firearm was supported by substantial evidence, including James's confusing description of defendant's gun during his 911 call. In addition, defendant argues James failed to describe to police any feature that would identify the gun as a semiautomatic, and he testified at trial that he was "not a gun expert." Defendant's contentions are without merit.

"We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense. [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1218.) In reviewing whether the trial court had a sua sponte duty to instruct the jury on a lesser included offense, we construe the evidence in the light most favorable to the appellant. (*People v. Turk* (2008) 164 Cal.App.4th 1361, 1368.)

The People do not dispute assault with a firearm is a lesser included offense of assault with a semiautomatic firearm. (*People v. Martinez* (2012) 208 Cal.App.4th 197, 199 ["firearm assault is a lesser included offense of a semiautomatic firearm assault"].) A trial court "must instruct on an uncharged offense that is less serious than, and included in, a charged greater offense, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged greater offense are present." (*People v. Huggins* (2006) 38 Cal.4th 175, 215.)

Still, there was no requirement that the trial court instruct the jury sua sponte as to assault with a firearm because there was no evidence defendant used a weapon other than a semiautomatic handgun in the assault. (See *People v. Breverman* (1998) 19 Cal.4th 142, 154 [trial court has no obligation to give instructions on lesser included offenses, " 'when there is no evidence that the offense was less than that charged' "].) Although

James may have expressed to the 911 operator confusion regarding the caliber of defendant's gun, he twice told the 911 operator that defendant had a Glock. In addition, when the police arrived, James told Deputy Johnson that, during the party, defendant had a semiautomatic pistol, which James "thought" was a ".40 caliber Glock." Despite James's testimony at trial that he was "not a gun expert," he knew the difference between a revolver and a semiautomatic weapon. In addition, at trial James was shown a photo of the gun that police found in defendant's bedroom on February 23, 2015, and James correctly identified the gun as, "not a revolver." Officer Rodriguez testified at trial the gun found on February 23, 2015, in defendant's bedroom was a semiautomatic .40-caliber handgun and looked similar to a Glock. Defendant's suggestion that he may have possessed a firearm other than a semiautomatic is speculation, which is an insufficient basis to require an instruction on a lesser included offense. (*People v. Sakarias* (2000) 22 Cal.4th 596, 620.)

II

As both parties acknowledge, defendant's 16-month sentence on count five should have been stayed pursuant to section 654.

"An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654.) Section 654 precludes multiple punishments for an indivisible course of conduct that violates more than one criminal statute. (*People v. Correa* (2012) 54 Cal.4th 331, 336.) When the evidence suggests the defendant's objective of committing one offense is merely to facilitate a second offense, the sentence for the lesser offense should be stayed. (See *People v. Hensley* (2014) 59 Cal.4th 788, 828 [robbery sentence stayed in light of sentence for attempted murder].)

During sentencing, the trial court stated the sentence for count five was 16 months in state prison, "consecutive because it's a crime that occurred at a different time,

different place, and not part of a single period of abhorrent behavior.” A trial court’s determination that two crimes are separate, involving separate objectives must be supported by substantial evidence, and here the record does not support the determination. (*People v. Brents* (2012) 53 Cal.4th 599, 618.) The information alleged counts three, four, and five occurred on February 1, 2015. During pretrial discussions, the prosecutor also clarified for the trial court that count five related to defendant’s possession during the incident on February 1, 2015, and not the fruitful search on February 23, 2015. Because being a felon in possession of a firearm on February 1, 2015, facilitated the assaults with a semiautomatic firearm occurring the same day, the separate unlawful possession sentence should have been imposed and stayed under section 654. (See *In re Jose P.* (2003) 106 Cal.App.4th 458, 469 [if two crimes are incident to a single objective, the trial court may impose sentence only for the one carrying the higher penalty], disapproved on other grounds as stated in *People v. Prunty* (2015) 62 Cal.4th 59, 78, fn. 5.)

III

Despite finding true two prior serious felonies (§ 667, subd. (a)) and one prior prison term (§ 667.5, subd. (b)), the trial court imposed sentence on but one prior serious felony each on counts three and four, omitting count two. In addition, the trial court imposed one prior prison term without stating it was striking the enhancement for two of the other three, eligible counts (counts two, three, and four), pursuant to section 1385, subdivision (a). As the People contend in their brief, this was error.

Under the “Three Strikes” law, a trial court must apply prior serious felony enhancements “individually to each count of a third strike sentence.” (*People v. Williams* (2004) 34 Cal.4th 397, 405.) Accordingly, the trial court should have imposed two additional five-year terms consecutively on each count to which it imposed a third-strike sentence, i.e., counts two, three, and four.

Similarly, section 667.5, subdivision (b) requires the trial court to either strike or impose an additional one-year prior prison term on each indeterminate term. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1561.) Thus, the trial court should have imposed or struck the prior prison term enhancement on counts two, three, and four. We shall remand the matter for the trial court to do so.

IV

The People note in their brief, the abstract of judgment incorrectly lists the date of conviction for San Joaquin County case No. SF130846A which the court resentenced in connection with this case.

DISPOSITION

Defendant's judgment is modified to stay his 16-month sentence for count five. The matter is remanded for resentencing on the sections 667, subdivision (a), and 667.5, subdivision (b), enhancements. The trial court is directed to prepare amended corrected abstracts of judgment, including the correct date of the conviction in the resentenced San Joaquin County case, No. SF130846A, and to forward certified copies of both abstracts to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

NICHOLSON, Acting P. J.

We concur:

ROBIE, J.

DUARTE, J.